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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JERRY WAYNE McCOY, JR., Defendant and Appellant.	F045249 (Super. Ct. No. F02670361-5) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Ralph Nuñez, Judge.

Deanna F. Lamb, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, J. Robert Jibson and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 1, 2, 4, 5, 7, 8, and 9.

INTRODUCTION

A jury found Jerry Wayne McCoy, Jr., guilty of one count of exhibiting harmful matter to a minor and guilty of four counts of committing a lewd and lascivious act on a child under the age of 14 years. (Pen. Code, §§ 288, subd. (a), 288.2, subd. (a).) In all five counts, his six-year-old stepdaughter B. was the victim.

On appeal, McCoy raises nine issues. In the published portion of our opinion, we will reject, after agreeing partly with his and partly with the Attorney General's analyses of the law, his challenge to the constitutionality of CALJIC No. 2.20.1 and, in a question of first impression, his argument that readback to the jury over express defense objection out of his and his attorney's presence violated his federal and state constitutional rights to counsel and due process. In the non-published portion of our opinion, we will agree with his argument that there is an insufficiency of the evidence to support the count six lewd and lascivious conviction but will decide all of his other arguments adversely to him. We will reverse the judgment on count six and will order the sentence on that count stricken from the judgment but will otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1998, when B. was three, her mother J. started dating McCoy. In 1999, J. moved with B. into McCoy's bedroom in the three-bedroom house he shared with two other people. At first, B. slept in a bed in McCoy's and J.'s bedroom, but after McCoy built her a room adjoining his and J.'s bedroom she slept there. In September 2001, McCoy and J. got married. Testifying in his own defense, McCoy denied the charges against him.

From the testimony of B., a detective who interviewed her, and a pediatric nurse practitioner who examined her, "about five" discrete incidents of criminal conduct by McCoy against B. emerged. The following sentences summarize the facts in those incidents without regard to the dates of occurrence, which are irrelevant to the issues on appeal. McCoy called her into his and J.'s bedroom, where she saw him sitting naked on

the floor watching a movie depicting a naked man and two naked women, one of whom wore a strap-on penis, having sex. She saw McCoy's penis was big and long and asked him, "What are you doing?," he showed her he was touching his penis and told her to put her mouth there and to touch him there, and she sucked his penis and touched his penis with a cupped hand and a stroking motion. He masturbated as he lay in bed and she watched. He rubbed her vagina with his penis and had her touch her vagina and rub her vagina on his penis. Sometimes, but not always, something came out of his penis.

On those facts, a jury found McCoy guilty of five discrete incidents of criminal conduct against B. comprising one count of exhibiting harmful matter – an adult video – to a minor and four counts of committing lewd and lascivious acts – placing her mouth on his penis, touching her vagina with his penis, having her touch his penis, and having her watch him masturbate – on a child under the age of 14 years. The court imposed a six-year term for exhibiting the harmful matter and concurrent terms for committing the lewd and lascivious acts.

DISCUSSION

1. Evidence of Child's Imagination

McCoy argues that the court's ruling precluding his proffer of "specific acts of dishonesty or fabrication to attack B[.]'s credibility" constituted a prejudicial abuse of discretion. The Attorney General argues that the court's ruling "excluding evidence of B[.]'s imagination" was not error.

The parties' mutually inconsistent characterizations of the court's ruling help to frame the issue before us. To shed light on that issue, we turn to the record of the motion in limine. McCoy's offer of proof was that a man who had babysat B. for years would testify she was "7, going on 15," had a "vivid imagination," was "bright" and "inquisitive," and once "created, in his words, an entire fantasy" of "an aquatic baby frog figurine in an aquarium." The prosecutor argued that the evidence had "no probative

value." McCoy argued that the evidence went "to her *imagination*, her manner of speech, her ma[nn]er of acting[, and] … [h]er reluctance to change once she makes a statement." (Italics added.) He analogized his offer of proof to the evidence that only after J. discovered B. masturbating to an adult magazine did she talk about the molestations, a chronology, he argued, that showed she "created something to get out of that trouble." Noting the risks of confusing the jury and wasting the jury's time with a story B. made up about a frog, the court ruled inadmissible the evidence in McCoy's offer of proof. (See Evid. Code, § 352.) "I just don't see that's relevant," the court stated. "I just don't see it. You made your offer of proof. I just can't see it."

Although McCoy accurately argues that his case "turns on the credibility of witnesses," the rules of evidence nonetheless apply. "No evidence is admissible except *relevant* evidence," which is "evidence**,** including evidence relevant to the credibility of a witness or hearsay declarant, having any *tendency in reason* to prove or disprove any *disputed fact* that is *of consequence* to the determination of the action." (Evid. Code, §§ 210, 350, italics added.) McCoy argues that his offer of proof showed "dishonesty or fabrication," but dishonesty describes acts that are neither "sincere" nor "trustworthy," and fabrication shows acts that one "invent[s] in order to deceive." (Oxford English Dict. Online (11th ed. 2004) <http://www.oxfordreference.com> [as of Oct. 26, 2005].) Neither characterization of B.'s innocent childhood fantasy is apt. To the contrary, as McCoy candidly acknowledged at the hearing on his motion in limine, his offer of proof showed *imagination* – "the ability of the mind to be creative or resourceful" or "the faculty or action of forming ideas or mental images." (Oxford English Dict. Online (11th ed. 2004) <http://www.oxfordreference.com> [as of Oct. 26, 2005].) The relevance of his offer of proof to any disputed fact of consequence was tenuous at best.

A reviewing court will disturb a court's exercise of discretion to admit or exclude evidence only on a showing of arbitrariness, capriciousness, or patent absurdity causing a

manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) McCoy fails to make the requisite showing.

2. Testimony of Pediatric Nurse Practitioner

McCoy argues that the court's ruling allowing the pediatric nurse practitioner to give opinion testimony about B.'s credibility as a witness constituted a prejudicial abuse of discretion. The Attorney General argues that there was no error.

At the hearing on McCoy's motion in limine, the court ordered the prosecutor to tell the witness not to testify that B. gave credible statements. At trial, on cross-examination by McCoy, she testified that B. "established that this was a definite sexual misuse [*sic*] abuse case, and that we needed to go further" and, in answer to the question, "So you assumed it happened?," testified, "I know that it happened. That was a very clear statement. I've never had such a clear statement from a child." On redirect examination, however, after the prosecutor asked if the witness remembered her testimony on cross-examination that she knew the molestation happened and she replied, "Yes," the court sustained McCoy's objection, granted his motion to strike, and admonished the jury:

> "During her cross-examination, [the pediatric nurse practitioner] opined that the molest had occurred, based on her interview with the child. That opinion is not permitted by law, so I'm striking her opinion. You're not to consider it for any purpose."

On further redirect examination, the prosecutor asked if "B[.] was very articulate and clear in what she had described." The witness replied, "Yes." He asked whether B. had given her "one of the clearer statements you had ever heard." She testified, "Yes." In answer to his questions about molestation complaints in other cases, she replied, "The child is generally vague, and the parent is generally vague." In those cases, she testified, "I go down a lot of blind alleys asking questions … and I don't generally get very direct answers." She testified that she "leave[s] not knowing whether any sexual misuse [*sic*]

occurred, generally," at which point the court sustained McCoy's objection and granted his motion to strike. "You leave without not [*sic*] having a lot of clear facts about what happened?," the prosecutor asked, to which she replied, "In general, I'm not given clear facts. In this case, I was given clear facts." On recross examination, McCoy asked, "When you form an assumption, not an opinion but an assumption, when taking a history, do you take into effect [*sic*] the relative age of a child and the cognizant development of a child?" She replied, "Yes. When a child makes a clear statement, that statement is true to that – and accurate to that child."

First, in reliance on cases like *People v. Melton* (1988) 44 Cal.3d 713, McCoy argues that the pediatric nurse practitioner's assessment of B.'s report of sexual abuse prejudiced him in violation of the rule that lay opinion evidence about the truth or falsity of another's statements is inadmissible. (*Id*. at p. 744; see generally Evid. Code, § 800.) His reliance on *Melton* is misplaced. Shorn of the evidence that the court struck after sustaining his objection, the record shows that B.'s report *specifically* was articulate and clear *to the pediatric nurse practitioner* and that a child's clear statement *generally* is accurate and true *to that child*. With reference to whether B.'s report *specifically* was credible *to the pediatric nurse practitioner* or whether a child's clear statement *generally* is credible *to the pediatric nurse practitioner*, however, the record is silent.

Second, in reliance on cases like *People v. McAlpin* (1991) 53 Cal.3d 1289, McCoy argues that expert opinion on the issue of child sexual abuse accommodation syndrome is admissible only to rebut misconceptions about child sexual abuse but not to prove sexual abuse of a specific child. (*Id*. at pp. 1300-1302; see generally Evid. Code, § 801.) He fails to show, however, that the testimony of the pediatric nurse practitioner infringed that rule. (Cf. Cal. Rules of Court, rule 14(a)(1)(C).) Like his lay opinion argument, his expert opinion argument has no merit.

3. CALJIC No. 2.20.1

McCoy argues that by improperly bolstering B.'s credibility CALJIC No. 2.20.1 violated his federal and state constitutional rights to confrontation, due process, jury trial, and presentation of a defense. The Attorney General argues that by not objecting below McCoy forfeited his right to appellate review and that the instruction is constitutional.

Preliminarily, we turn to the Attorney General's forfeiture argument. Applying the established rule that allows appellate review, even in the absence of an objection, of any instruction affecting the substantial rights of the accused, we reject his argument. (Pen. Code, § 1259; *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7.)

Fifteen years ago, the California Supreme Court characterized the Legislature's enactment of Penal Code section 1127f,[1] which mandates the instruction that CALJIC No. 2.20.1[2] now incorporates, as adopting the modern view of criminal jurisprudence that rejects traditional notions of child witnesses as susceptible to leading questions, incapable of recalling prior events accurately, and neither reliable nor truthful. (*People v. Jones*

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[1] Penal Code section 1127f provides: "In any criminal trial or proceeding in which a child 10 years of age or younger testifies as a witness, upon the request of a party, the court shall instruct the jury, as follows: [¶] In evaluating the testimony of a child you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. Although, because of age and level of cognitive development, a child may perform differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child."

[2] CALJIC No. 2.20.1 provides: "In evaluating the testimony of a child ten years of age or younger you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. A child, because of age and level of cognitive development, may perform differently than an adult as a witness, but that does not mean that a child is any more or less believable than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child. [¶] 'Cognitive' means the child's ability to perceive, to understand, to remember, and to communicate any matter about which the child has knowledge."

(1990) 51 Cal.3d 294, 315.) Three subsequent Court of Appeal cases have rejected constitutional challenges to CALJIC No. 2.20.1.

Two of those cases arise from the Fourth Appellate District, Division Two. In the first of those cases, *People v. Harlan* (1990) 222 Cal.App.3d 439 (*Harlan*), the court held that the instruction neither excessively inflates a child's testimony nor impermissibly usurps the jury's role as arbiter of witness credibility nor violates the accused's right to confront a child witness nor "require[s] the jury to draw any particular inferences from a child's cognitive ability, age and performance as a witness. Rather, it instructs the jury to consider such factors in evaluating a child's testimony." (*Id*. at pp. 455-457.) In the second of those cases, *People v. Jones* (1992) 10 Cal.App.4th 1566 (*Jones*), the court held that the instruction "presupposes that the jury must make a determination of credibility, but only after considering all the factors related to a child's testimony, including his [or her] demeanor, i.e., how he or she testifies on the stand," all without "'foreclos[ing] independent jury consideration of the credibility of a child witness.'" (*Id*. at pp. 1572, 1574.) A case from the Sixth Appellate District held that CALJIC No. 2.20.1 neither "'lessen[s] the government's burden of proof'" nor "'instructs the jury to unduly inflate the testimony of a child witness'" (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1393 (*Gilbert*):

> "The instruction tells the jury not to make its credibility determinations solely on the basis of the child's 'age and level of cognitive development,' but at the same time invites the jury to take these and all other factors surrounding the child's testimony into account. The instruction provides sound and rational guidance to the jury in assessing the credibility of a class of witnesses as to whom '"traditional assumptions"' may previously have biased the fact-finding process. Obviously a criminal defendant is entitled to fairness, but just as obviously he or she cannot complain of an instruction the necessary effect of which is to increase the likelihood of a fair result."

McCoy argues that "*Harlan, Jones,* and *Gilbert* were wrongly decided." He emphasizes verbiage in *Harlan* that *Jones* quoted with approval about how the word

"perform" in CALJIC No. 2.20.1 "implies nonverbal action" and about how the instruction "does not relate to the truth or falsity of the content of the child's testimony." (*People v. Jones, supra,* 10 Cal.App.4th at pp. 1572-1573, quoting *People v. Harlan, supra,* 222 Cal.App.3d at p. 455.)

First, McCoy paints with too broad a brush. *Gilbert* simply ignored the *Harlan/Jones* verbiage and cut to the chase: "Our own consideration of Penal Code section 1127f and CALJIC No. 2.20.1 satisfies us that *Harlan* reached *the right result*." (*People v. Gilbert, supra,* 5 Cal.App.4th at p. 1393, italics added.)

Second, the *Harlan/Jones* verbiage cannot withstand thoughtful analysis. By stating that a child "may perform differently than an adult" "because of age and level of *cognitive* development" and defining "'cognitive'" as "the child's ability to perceive, to understand, to remember, and to *communicate*," the instruction straightforwardly tells the jury that a child may perform differently than an adult "*because of*" the "*level of*" his or her "*ability to … communicate*." (CALJIC No. 2.20.1, italics added.) The instruction expressly allows a reasonable likelihood that the jury did *not* construe the word "perform" to apply only to "nonverbal action." (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73 & fn. 3 ["reasonable likelihood" standard of review]; *People v. Clair* (1992) 2 Cal.4th 629, 663 [same].)

At oral argument, McCoy intimated that the infirmity he assigns to CALJIC No. 2.20.1 infects the new Judicial Council child witness instruction as well. (CALCRIM No. 330 (Testimony of Child 10 Years of Age or Younger), Judicial Council of California Criminal Jury Instructions (2006).[3]) He is wrong. The *Harlan/Jones*

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[3] CALCRIM No. 330 provides: "You have heard testimony from a child who is age 10 or younger. As with any other witness, you must decide whether the child gave truthful and accurate testimony. [¶] In evaluating the child's testimony, you should consider all of the factors surrounding that testimony, including the child's age and level of cognitive development. [¶] When you evaluate the child's cognitive development, consider the child's ability to perceive, understand, remember, and communicate. [¶]

verbiage originates entirely from case law, finds no support in CALJIC No. 2.20.1 or CALCRIM No. 330, fails to diminish the persuasiveness of the holdings in *Harlan* and *Jones*, and has no impact at all on the holding in *Gilbert*. In express reliance on the holdings in *Harlan*, *Jones*, and *Gilbert* alike, we squarely reject McCoy's constitutional challenges to CALJIC No. 2.20.1.

4. Argument to Jury

McCoy argues that the prosecutor committed misconduct by arguing that the criminal justice system should not tell B. that she was not molested just because she did not remember every detail correctly. The Attorney General argues that there was no prosecutorial misconduct and that error if any was harmless.

Once again, the parties' mutually inconsistent characterizations of the court's ruling help to frame the issue before us. McCoy argues that "by asking the jury to send a message to B[.]" the prosecutor committed misconduct. Emphasizing that the prosecutor "never used the words 'send a message,'" the Attorney General argues that he "used a rhetorical device to point out that B[.]'s strong testimony should not be disbelieved merely because she misidentified the color" of two items in her testimony. As the exact words "send a message" have no talismanic significance, we look to the record and to the case law before assessing the propriety of the prosecutor's argument.

The prosecutor argued that no one from his office talked with B. about the specifics of the case or refreshed her memory with the pediatric nurse practitioner's report but that to avoid traumatizing her he met with her in his office, talked with her about things like school, and showed her where she, McCoy, and the jury were going to sit in court. "She was molested by Jerry McCoy," he argued. "She is not going to be

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While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child."

molested by the criminal justice system." He argued that B.'s failure to remember details like the color of a woman's hair and the color of a strap-on penis were inconsequential. "Are you going to tell this child that she wasn't molested because she didn't get the hair color right?," the prosecutor asked the jury. "Are you going to tell this child that she was not molested because she missed out on the color of that penis?"

McCoy objected: "Nobody's telling the child anything." He called the prosecutor's argument an "appeal to passion and prejudice," argued that the jury's duty was "to decide whether the case has been proved or not proved and not to consider what that message may or may not say to the girl or any other person" and moved for a mistrial. Finding that the prosecutor was simply asking the jury to decide the case on the basis of the evidence, the court overruled his objection and denied his motion.

In a case of first impression in the federal courts, the Sixth Circuit Court of Appeals held that by "calling on this jury to speak out for the community" and "to be the world conscience of the community" the prosecutor's argument to the jury did not exceed "permissible bounds of advocacy." (*United States v. Alloway* (6th Cir. 1968) 397 F.2d 105, 113 (*Alloway*); Duane, *What Message Are We Sending To Criminal Jurors When We Ask Them To "Send A Message" With Their Verdict?* (1995) 22 Am.J.Crim.Law 565, 570-571.) Shedding some light on the fine line between legitimate argument and misconduct, the same court later held that by "asking [the jury] to tell [the accused] and all of the other drug dealers like her … [t]hat we don't want that stuff in Northern Kentucky" the prosecutor's argument to the jury constituted prosecutorial misconduct since the "fear surrounding the War on Drugs undoubtedly influenced the jury by diverting its attention away from its task to weigh the evidence and submit a reasoned decision finding defendant guilty or innocent of the crimes with which she was charged." (*United States v. Solivan* (6th Cir. 1991) 937 F.2d 1146, 1148, 1153, 1155 (*Solivan*), italics omitted.) In a nutshell, McCoy argues that his case falls within the *Solivan* exception to the *Alloway* rule.

The vitality of the *Alloway* rule is in doubt, however. Federal appellate courts unanimously embrace the rule that prosecutors may invite juries to "send a message" as the "conscience of the community," but federal trial courts and state appellate courts alike just as frequently "disavow and renounce" those arguments. (Duane, *What Message Are We Sending To Criminal Jurors When We Ask Them To "Send A Message" With Their Verdict?* (1995) 22 Am.J.Crim.Law 565, 579-581.) Nonetheless, the record poses no issue for us to address within the scope of that doctrinal ferment. Here, the prosecutor neither exhorted the jury to send the community a message nor played with jurors' emotions about an issue not properly before the jury but instead simply asked the jury to decide the case on the basis of the evidence.

In reliance on *People v. Mendoza* (1974) 37 Cal.App.3d 717 (*Mendoza*), McCoy argues that California cases recognize that the prosecutor's request that the jury send a message "plays on the sympathies of a jury in a molestation case involving a child victim." The prosecutor's argument here did nothing like that. Instead of the rhetorical device, "Are you going to tell this child that she wasn't molested because she … ?," he just as well could have asked the jury, "Are you going to find McCoy not guilty because [B.] …?" *Mendoza* condemned an "appeal to passion and prejudice" entirely absent from the record here. (*Id*. at p. 727.) Likewise, McCoy's reliance on *People v. Jones* (1970) 7 Cal.App.3d 358 is equally misplaced. In that case, a prosecution for an attack without provocation on a motorcyclist, the court lambasted as a "crude appeal to the fears and emotions of the jurors" the prosecutor's argument that the sons of the jurors and the girlfriends of the sons of the jurors dare not ride motorcycles near the accused. (*Id*. at p. 363.) Nothing like that appears in the record here.

Prosecutors have wide latitude to draw inferences from the evidence at trial and to argue those inferences to the jury. (*People v. Lucas* (1995) 12 Cal.4th 415, 473.) The jury has the prerogative to decide whether the prosecutor's inferences are reasonable. (*Id*. at p. 474.) Ultimately, the test for prosecutorial misconduct is whether the prosecutor

used "deceptive or reprehensible methods" to persuade the jury. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) McCoy fails to make the requisite showing.

5. Admission Against Interest

McCoy argues that the court committed an abuse of discretion and violated due process by allowing the prosecutor to adduce evidence of "vague assertions of prior bad acts." The Attorney General argues that the critical item of evidence was an admission against interest and that the court did not err.

McCoy emphasizes five discrete portions of the record. (Cf. Cal. Rules of Court, rules 14(a)(1)(C) & (a)(2)(C).) First, the prosecutor asked him if he was ordered to stay away from J. Second, the prosecutor asked him if he promised the judge he would stay away from her. Third, he testified he did not attempt to convince J. not to put B. on the witness stand. Fourth, he testified he did not tell J. he had gotten away with other stuff in the past and was going to get away with this. Fifth, the court characterized the evidence not as prior bad acts but as admissions against interest and on that ground overruled his objections and denied his motion for a mistrial.

At trial, McCoy and J. both testified to intense marital strife. With reference to the prosecutor's first question about the stay-away order, McCoy gave a one-word reply – "Correct" – but did not reply at all to the prosecutor's second question about the order, as the court ordered a sidebar before he answered. As J. testified without objection that a mutual restraining order prohibited each from contacting the other, the evidence from his testimony on the issue of the stay-away order was cumulative.

McCoy fails to show how his testimony that he did not attempt to convince J. not to put B. on the witness stand could have prejudiced him. Likewise, he fails to show how his testimony that he did not tell J. he had gotten away with other stuff in the past and was going to get away with this could have prejudiced him. As the Attorney General notes, the court ruled admissible J.'s testimony that McCoy told her, in the words of a

police report, that "if I've gotten away with all these other things, it's not like I'm not going to get away with this," on the ground, in the court's words, that her testimony "impeaches his testimony in court that he didn't do anything, that he's innocent." The court's ruling that his testimony was an admission against interest was correct.[4] As J. later testified that McCoy told her "it's not like I haven't got away with other things, and it's not like I'm not going to get away with this, too," his self-serving testimony to the contrary could only have helped him.

Even if the evidence he challenges was relevant, McCoy argues, the court should have found that "the substantial risk of prejudice" outweighed "the small amount of probative value." Since all evidence that "'tends to prove guilt is prejudicial or damaging to the defendant's case,'" the prejudice Evidence Code section 352 seeks to avoid is not "the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence" but rather the prejudice of evidence that "uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Evidence that is substantially more prejudicial than probative within the meaning of the statute is that which "poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.'" (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) None of the evidence McCoy challenges even approaches the requisite notoriety. The record shows neither an abuse of discretion nor a violation of due process.

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[4] Evidence Code section 1220: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

6. Readback to the Jury

McCoy argues that readback to the jury over express defense objection out of his and his attorney's presence violated his federal and state constitutional rights to counsel and due process. The Attorney General argues that error, if any, was harmless.

During deliberations, the jury sent the court a note asking for readback of B.'s testimony about watching videos with McCoy and about viewing photographs on the computer. The court granted the request, ordered readback in the jury room, and admonished the jurors not to ask questions, not to discuss the case while the court reporters were in the jury room, and – if the jurors felt something was missing – to request additional readback from the court reporters on the topics in the jury's note but otherwise to request additional readback only from the court. McCoy objected and requested "that the reread be in open court so that we could see and hear what is being read to the jury and a record could be made of that" and so that he could "either object to or ask for additions or things like that." The court overruled the objection.

As the United States Constitution guarantees the accused the right "to have the Assistance of Counsel for his [or her] defence" (U.S. Const., 6th Amend.), so the California Constitution grants to the accused the rights "to have the assistance of counsel" and "to be personally present with counsel" and requires that those rights "shall be construed by the courts of this state in a manner consistent with the Constitution of the United States" (Cal. Const., art. I, §§ 15, 24). Likewise, as the United States Constitution proclaims that no state shall "deprive any person of life, liberty, or property, without due process of law" (U.S. Const., 14th Amend.), so the California Constitution declares that no person may "be deprived of life, liberty, or property without due process of law" (Cal. Const., art. I, §§ 7, 15).

Construing the contours generally of the constitutional rights at issue here, the United States Supreme Court has articulated the accused's right to the presence of counsel "at every stage of a criminal proceeding where substantial rights of a criminal

accused may be affected" (*Mempa v. Rhay* (1967) 389 U.S. 128, 134), the accused's right "to be present at all critical stages of the criminal prosecution where his [or her] absence might frustrate the fairness of the proceedings" (*Faretta v. California* (1975) 422 U.S. 806, 819, fn. 15, citing *Snyder v. Massachusetts* (1934) 291 U.S. 97, overruled on other grounds by *Duncan v. Louisiana* (1968) 391 U.S. 145, 154-155, and *Malloy v. Hogan* (1964) 378 U.S. 1, 2, fn. 1, & 11), and the accused's right "'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge'" (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745). The high court has never held that readback is a critical stage of trial. (See *La Crosse v. Kernan* (9th Cir. 2001) 244 F.3d 702, 707-708.)

In the absence of United States Supreme Court authority, McCoy relies on Ninth Circuit cases. (See, e.g., *Fisher v. Roe* (9th Cir. 2001) 263 F.3d 906, 913-917 (*Fisher*) [grant of relief after readback in absence of and without knowledge of either accused or accused's attorney], abrogated on another ground by *Mancuso v. Olivarez* (9th Cir. 2002) 292 F.3d 939, 944, fn. 1; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 814-815 [same], overruled on another ground by *Tolbert v. Page* (1999) 182 F.3d 677, 685.) Even on federal questions, however, Ninth Circuit cases do not bind the state courts. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.)

Construing the contours of the constitutional rights at issue here specifically with reference to readback, the California Supreme Court has rebuffed several challenges akin to McCoy's. In *People v. Cox* (2003) 30 Cal.4th 916, the court noted in passing that both the accused and his attorneys waived their presence at readback but denied relief on the ground that "the rereading of testimony is not a critical stage of the proceedings." (*Id*. at p. 963.) The court distinguished *Fisher* on the ground that neither the accused nor his attorney even knew about the readback. (*Ibid*.) In *People v. Horton* (1995) 11 Cal.4th 1068, with no showing that the accused's personal presence could have assisted the defense in any way, the court held that his attorney's stipulation to readback without his

or his attorney's presence was not ineffective assistance. (*Id*. at pp. 1120-1121, 1127; cf. *People v. Ayala* (2000) 23 Cal.4th 225, 287-289.) "The reading back of testimony ordinarily is not an event that bears a substantial relation to the defendant's opportunity to defend," the court observed. (*People v. Horton, supra,* 11 Cal.4th. at p. 1121.)

Similarly, the court held in *People v. Pride* (1992) 3 Cal.4th 195 that despite the absence of a personal waiver by the accused his attorney's waiver of the presence of both attorney and client at readback did not violate the accused's federal or state constitutional rights to counsel and due process even though, as the court acknowledged, "no one was present (the court, counsel, or defendant) to monitor or report the readback." (*Id*. at p. 251.) Congruently, the court held in *People v. Bloyd* (1987) 43 Cal.3d 333 (*Bloyd*) that the accused's attorney's stipulation to the absence of attorney and client alike from readback did not abridge the accused's federal constitutional right to counsel or state constitutional right to be present at trial even in the absence of his express consent. (*Id*. at pp. 358-361.)[5] Likewise, where the accused's attorney "purported to waive" the accused's presence, "various portions of testimony were reread to the jury," and the appellate briefing made no contention "that any other exchanges between the judge and jury, or counsel and jury, took place," the court in *People v. Hovey* (1988) 44 Cal.3d 543 declined to grant relief since "rereading of testimony ordinarily would not be an event which bears a substantial relation to the defendant's opportunity to defend, and nothing in

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[5] No issue arose in *Bloyd*, nor does McCoy raise one here, of noncompliance with the statute mandating readback "'in the presence of, *or* after notice to, the prosecuting attorney, and the defendant or his counsel, *or* after they have been called.'" (*People v. Bloyd, supra,* 43 Cal.3d at p. 361, quoting Pen. Code, § 1138, italics added; see *People v. Frye* (1998) 18 Cal.4th 894, 1007 [violation of statutory mandate implicates accused's right to fair trial].) Likewise, McCoy raises no issue here of noncompliance with the statute requiring the accused's presence at all felony proceedings in the absence of a written waiver. (Pen. Code, § 977; see *People v. Bradford* (1997) 15 Cal.4th 1229, 1357 [remedy for violation of statutory right only if violation of constitutional right].)

the present record indicates that defendant's personal presence would have assisted the defense in any way." (*Id*. at p. 585)

Inferring a general rule from United States Supreme Court and California Supreme Court cases, we hold by parity of reasoning, on a record not only showing that the court carefully admonished the jury before readback but also failing to show, let alone intimate, that McCoy's or his attorney's presence during readback could have assisted the defense in any way, that the court committed no constitutional error in allowing readback over express defense objection.[6]

7. Unanimity Instruction

McCoy argues that the court's failure to give a sua sponte unanimity instruction and the court's refusal of his request to so instruct were prejudicial error. The Attorney General argues that the court did not err.

After the instruction-settling conference, McCoy made a record of his requests, first, that the prosecutor elect "to which tape-playing" the exhibiting harmful matter count referred and, second, that the court give one or two unanimity instructions to the jury. (CALJIC Nos. 4.71.5, 17.01.) The prosecutor argued that he was relying on B.'s testimony as to what she saw, not on either his election or her identification of a specific tape. On the rationale that the issue before the jury was to decide whether McCoy exhibited harmful matter with the specific intent to seduce, not to find which video was the harmful matter with which he did so, if indeed he did so, the court denied both of his requests.

The rule is settled that where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the

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[6] Our holding that the court committed no error moots McCoy's argument about the incompatibility of federal and state standards for determining whether readback error is reversible.

accused's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the "theory" of the accused's guilt. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Indeed, "'different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.'" (*Schad v. Arizona* (1991) 501 U.S. 624, 631-632.) Burglary illustrates well the difference between discrete crimes, which require a unanimity instruction, and theories of the case, which do not. Evidence showing two different entries with burglarious intent on two different days at two different addresses would require a unanimity instruction, but evidence showing a single entry with ambiguity about the exact burglarious intent, on the other hand, would require no unanimity instruction since the lack of certainty involves only the theory of the case. (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1453.)

McCoy's defense to the charge of exhibiting harmful matter was simply that he never showed B. "any sexual materials." The prosecutor asked the jurors to find him guilty of exhibiting harmful matter not by selecting one from among several discrete videos but by agreeing that he showed B. "adult *films*." (Italics added.) The court instructed the jury that harmful matter was that "which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct, and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." (CALJIC No. 10.58.) Implicit in the verdict was unanimous agreement by the jurors that McCoy exhibited harmful matter to B. The court committed no error by denying his request for an election, denying his request for a unanimity instruction, and not giving a unanimity instruction sua sponte.

8. Sufficiency of the Evidence

McCoy argues that there is an insufficiency of the evidence of a touching in the lewd and lascivious count charging him with having B. watch him masturbate. The Attorney General concedes that there is an insufficiency of the evidence of a touching with reference to that conduct but argues that there is a sufficiency of the evidence of a touching nonetheless since the prosecutor argued to the jury that McCoy's having B. masturbate, not his having B. watch him masturbate, was the conduct at issue in that count.

Count six of the first amended information charged that the facts giving rise to McCoy's lewd and lascivious act on B. were his "[h]aving the child watch the defendant masturbate." The jury found him guilty "as charged in Count Six of the First Amended Information." Acknowledging those aspects of the record, the Attorney General nonetheless counters that "[c]ount six should have read 'Having the child masturbate'" and emphasizes that the prosecutor argued to the jury that McCoy "told B[.] to touch her vagina."

Our role in a challenge to the sufficiency of the evidence in a criminal case is limited to determining whether, on the entire record, viewing the evidence in the light most favorable to the prosecution and presuming in support of the judgment every fact reasonably inferable from the evidence, a rational trier of fact could find the accused guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We agree with the parties that even though a child can perform a touching if someone else with the requisite specific intent instigates the touching, a lewd and lascivious act nonetheless requires a touching. (See, e.g., *People v. Martinez* (1995) 11 Cal.4th 434, 442-452; *People v. Austin* (1980) 111 Cal.App.3d 110, 114.) The conduct in the information and the jury's verdict involved no touching at all, however. Since no rational trier of fact could find McCoy guilty beyond a reasonable doubt of a lewd and lascivious act on the basis of that conduct, we decline the Attorney General's tacit invitation without

citation of authority to amend the information nunc pro tunc. We hold instead that an insufficiency of the evidence of a touching is fatal to the count six lewd and lascivious conviction.

9. Cumulative Prejudice

McCoy argues that the errors, even if not prejudicial individually, denied him a fair trial cumulatively. The Attorney General argues that there was no error and that error if any was harmless.

On the ground of insufficiency of the evidence, the count six lewd and lascivious conviction cannot stand (part 8, *ante*), but as none of McCoy's other arguments persuades us that the record shows any other error, his cumulative prejudice argument has no merit. (See *People v. Heard* (2003) 31 Cal.4th 946, 982.)

DISPOSITION

The judgment is reversed on the count six lewd and lascivious conviction. The sentence is ordered stricken from the judgment on that count. The matter is remanded with directions to the superior court to issue, and to send to every appropriate person a certified copy of, an abstract of judgment amended accordingly. McCoy has no right to be present at those proceedings. (See *People v. Price* (1991) 1 Cal.4th 324, 407-408.) Otherwise the judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Cornell, J.